



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

Comparability Determination for the European Union: Certain Entity-Level Requirements

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Comparability Determination for Certain Requirements under the European Market Infrastructure Regulation.

SUMMARY: The following is the analysis and determination of the Commodity Futures Trading Commission (“Commission”) regarding certain parts of a joint request by the European Commission (“EC”) and the European Securities and Markets Authority (“ESMA”) that the Commission determine that laws and regulations applicable in the European Union (“EU”) provide a sufficient basis for an affirmative finding of comparability with respect to the following regulatory obligations applicable to swap dealers (“SDs”) and major swap participants (“MSPs”) registered with the Commission: (i) chief compliance officer; (ii) risk management; and (iii) swap data recordkeeping; (collectively, the “Internal Business Conduct Requirements”).

EFFECTIVE DATE: This determination will become effective immediately upon publication in the Federal Register.

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SUPPLEMENTARY INFORMATION:

I. Introduction

On July 26, 2013, the Commission published in the Federal Register its “Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations” (the “Guidance”).¹ In the Guidance, the Commission set forth its interpretation of the manner in which it believes that section 2(i) of the Commodity Exchange Act (“CEA”) applies Title VII’s swap provisions to activities outside the U.S. and informed the public of some of the policies that it expects to follow, generally speaking, in applying Title VII and certain Commission regulations in contexts covered by section 2(i). Among other matters, the Guidance generally described the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission addressed a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission’s regulations promulgated thereunder.

In addition to the Guidance, on July 22, 2013, the Commission issued the Exemptive Order Regarding Compliance with Certain Swap Regulations (the “Exemptive Order”).² Among other things, the Exemptive Order provided time for the Commission to consider substituted compliance with respect to six jurisdictions where non-U.S. SDs

¹ 78 FR 45292 (July 26, 2013). The Commission originally published proposed and further proposed guidance on July 12, 2012 and January 7, 2013, respectively. See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012) and Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013).

² 78 FR 43785 (July 22, 2013).

are currently organized. In this regard, the Exemptive Order generally provided non-U.S. SDs and MSPs in the six jurisdictions with conditional relief from certain requirements of Commission regulations (those referred to as “Entity-Level Requirements” in the Guidance) until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination.³

On May 7, 2013, the EC and ESMA (collectively, the “applicant”) submitted a request that the Commission determine that laws and regulations applicable in the EU provide a sufficient basis for an affirmative finding of comparability with respect to certain Entity-Level Requirements, including the Internal Business Conduct Requirements.⁴ The applicant provided Commission staff with an updated submission on August 6, 2013. On November 11, 2013, the application was further supplemented with corrections and additional materials. The following is the Commission’s analysis and determination regarding the Internal Business Conduct Requirements, as detailed below.⁵

II. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act⁶ (“Dodd-Frank Act” or “Dodd-Frank”), which, in Title VII, established a new regulatory framework for swaps.

³ The Entity-Level Requirements under the Exemptive Order consist of 17 CFR 1.31, 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, 23.608, 23.609, and parts 45 and 46 of the Commission’s regulations.

⁴ For purposes of this notice, the Internal Business Conduct Requirements consist of 17 CFR 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606.

⁵ This notice does not address swap data repository reporting (“SDR Reporting”). The Commission may provide a comparability determination with respect to the SDR Reporting requirement in a separate notice.

⁶ Public Law 111-203, 124 Stat. 1376 (2010).

Section 722(d) of the Dodd-Frank Act amended the CEA by adding section 2(i), which provides that the swap provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swap provisions of the CEA enacted under Title VII of the Dodd-Frank Act.⁷ In the three years since its enactment, the Commission has finalized 68 rules and orders to implement Title VII of the Dodd-Frank Act. The finalized rules include those promulgated under section 4s of the CEA, which address registration of SDs and MSPs and other substantive requirements applicable to SDs and MSPs. With few exceptions, the delayed compliance dates for the Commission’s regulations implementing such section 4s requirements applicable to SDs and MSPs have passed and new SDs and MSPs are now required to be in full compliance with such regulations upon registration with the Commission.⁸ Notably, the requirements under Title VII of the Dodd-Frank Act related to SDs and MSPs by their terms apply to all registered SDs and MSPs, irrespective of where they are located, albeit subject to the limitations of CEA section 2(i).

To provide guidance as to the Commission’s views regarding the scope of the cross-border application of Title VII of the Dodd-Frank Act, the Commission set forth in the Guidance its interpretation of the manner in which it believes that Title VII’s swap provisions apply to activities outside the U.S. pursuant to section 2(i) of the CEA.

⁷ 7 U.S.C. § 2(i).

⁸ The compliance dates are summarized on the Compliance Dates page of the Commission’s Web site. (<http://www.cftc.gov/LawRegulation/DoddFrankAct/ComplianceDates/index.htm>.)

Among other matters, the Guidance generally described the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission addressed a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission's regulations. With respect to the standards forming the basis for any determination of comparability ("comparability determination" or "comparability finding"), the Commission stated:

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant. In this context, comparable does not necessarily mean identical. Rather, the Commission would evaluate whether the home jurisdiction's regulatory requirement is comparable to and as comprehensive as the corresponding U.S. regulatory requirement(s).⁹

Upon a comparability finding, consistent with CEA section 2(i) and comity principles, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime, subject to any conditions the Commission places on its finding, and subject to the Commission's retention of its examination authority and its enforcement authority.¹⁰

⁹ 78 FR at 45342-45.

¹⁰ See the Guidance, 78 FR at 45342-44.

In this regard, the Commission notes that a comparability determination cannot be premised on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction, but rather on whether information relevant to the Commission's oversight of an SD or MSP would be directly available to the Commission and any U.S. prudential regulator of the SD or MSP.¹¹ The Commission's direct access to the books and records required to be maintained by an SD or MSP registered with the Commission is a core requirement of the CEA¹² and the Commission's regulations,¹³ and is a condition to registration.¹⁴

III. Regulation of SDs and MSPs in the EU

On May 7, 2013, the EC and ESMA submitted a request that the Commission assess the comparability of laws and regulations applicable in the EU with the CEA and the Commission's regulations promulgated thereunder. The applicant provided

¹¹ Under §§ 23.203 and 23.606, all records required by the CEA and the Commission's regulations to be maintained by a registered SD or MSP shall be maintained in accordance with Commission regulation 1.31 and shall be open for inspection by representatives of the Commission, the United States Department of Justice, or any applicable prudential regulator.

In its Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013), the Commission noted that an applicant for registration as an SD or MSP must file a Form 7-R with the National Futures Association and that Form 7-R was being modified at that time to address existing blocking, privacy, or secrecy laws of foreign jurisdictions that applied to the books and records of SDs and MSPs acting in those jurisdictions. *See id.* at 871-72 n. 107. The modifications to Form 7-R were a temporary measure intended to allow SDs and MSPs to apply for registration in a timely manner in recognition of the existence of the blocking, privacy, and secrecy laws. In the Guidance, the Commission clarified that the change to Form 7-R impacts the registration application only and does not modify the Commission's authority under the CEA and its regulations to access records held by registered SDs and MSPs. Commission access to a registrant's books and records is a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto. The Commission has maintained an ongoing dialogue on a bilateral and multilateral basis with foreign regulators and with registrants to address books and records access issues and may consider appropriate measures where requested to do so.

¹² *See e.g.*, sections 4s(f)(1)(C), 4s(j)(3) and (4) of the CEA.

¹³ *See e.g.*, §§ 23.203(b) and 23.606.

¹⁴ *See supra* note 10.

Commission staff with an updated submission on August 6, 2013. On November 11, 2013, the application was further supplemented with corrections and additional materials.

As represented to the Commission by the applicant, swap activities in the EU member states is governed primarily by the European Market Infrastructure Regulation (“EMIR”).¹⁵

EMIR and the Regulatory Technical Standards (“RTS”) are regulations with immediate, binding, and direct effect in all EU member states (*i.e.*, no transposition into domestic law required). EMIR entered into force on August 16, 2012.

In addition, as represented to the Commission by the applicant, swap activities in the EU are also governed by a number of regulatory requirements other than EMIR.

Markets in Financial Instruments Directive (“MiFID”):¹⁶ MiFID is a directive and in accordance with the Treaty on the Functioning of the European Union, all Member States of the EU are legally bound to implement the provisions of MiFID by November 1, 2007, by transposing them into their national laws. MiFID applies in particular to investment firms, which comprise any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis. Investment services and activities means any of the services and activities listed in Section A of Annex I of MiFID relating to any of the instruments listed in Section C of Annex I of

¹⁵ EMIR: Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>

¹⁶ Directive 2004/39/EC and the relevant implementing measures (Directive 2006/73/EC and Regulation 1287/2006). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0039:EN:NOT>

MiFID. Section C of Annex 1 refers explicitly to swaps as well as “other derivative financial instruments”.

Capital Requirements Directive (“CRD”):¹⁷ CRD is also a directive and in accordance with the Treaty on the Functioning of the European Union, all Member States of the EU are legally bound to implement the provisions of CRD by December 31, 2006, by transposing them into their national laws.¹⁸

Due to the requirement that each EU Member State transpose MiFID and CRD into its national law, the comparability determinations in this notice are based on the representations of the applicant to the Commission that (i) each Member State of the EU where an SD or MSP would seek to rely on substituted compliance on the basis of the comparability of the MiFID or CRD standards has completed the process of transposing MiFID and CRD into its national law;¹⁹ (ii) such national laws have transposed MiFID and CRD without change in any aspect that is material for a comparability determination

¹⁷ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006L0048:20100330:EN:PDF>. The current version of CRD will soon be replaced by CRD IV. CRD IV entered into force on June 28, 2013, and shall apply in most of its parts from January 1, 2014.

¹⁸ Because the applicant’s request and the Commission’s determinations herein are based on the comparability of EU requirements applicable to entities subject to EMIR, MiFID, and CRD, an SD or MSP that is not subject to the requirements of EMIR, MiFID, or CRD upon which the Commission bases its determinations, may not be able to rely on the Commission’s comparability determinations herein. The applicant has noted for the Commission that the concept of an MSP is not explicitly mirrored in EU legislation and so it cannot be confirmed that MSPs would always be covered by EMIR, MiFID, or CRD. However, the applicant states that the definition of an “investment firm” under MiFID is considerably wider than that of an SD, and thus MSP’s should, in most cases, be caught within the definition of “investment firm.”

¹⁹ See the website of the European Commission for confirmation of the transposition of MiFID into the national law of each Member State, available here:
http://ec.europa.eu/internal_market/securities/docs/transposition/table_en.pdf. Note that the issue of partial implementation in the Netherlands was resolved in 2008,
http://ec.europa.eu/eu_law/eulaw/decisions/dec_08_05_06.htm. The Commission notes that the EC has certified to the Commission that each Member State in which a registered SD or MSP is organized has completed the transposition process (e.g., Ireland, UK, France, Spain, and Germany).

contained herein; and (iii) such transposed law is in full force and effect as of the time that any SD or MSP seeks to rely on a relevant comparability determination contained herein. The Commission notes that to the extent that any of the foregoing representations are incorrect, an affected comparability determination will not be valid.

In addition to MiFID and CRD, the applicant noted that there are a number of proposed laws and regulations that, when implemented, would affect the regulation of SDs and MSPs in the EU.²⁰

IV. Comparable and Comprehensiveness Standard

The Commission's comparability analysis will be based on a comparison of specific foreign requirements against the specific related CEA provisions and Commission regulations as categorized and described in the Guidance. As explained in the Guidance, within the framework of CEA section 2(i) and principles of international comity, the Commission may make a comparability determination on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole.²¹ In making its comparability determinations, the Commission may include conditions that take into account timing and other issues related to coordinating the implementation of reform efforts across jurisdictions.²²

²⁰ The applicant provided information regarding MiFID II and the Markets in Financial Instruments Regulation ("MiFIR"), http://ec.europa.eu/internal_market/securities/isd/mifid/index_en.htm, stating that these two proposals are part of the legislative package for the review of MiFID, and that the legislative process may be concluded with the adoption of the final political agreement by the end of 2013. The applicant further stated that an additional 18 to 24 months will be needed to adopt implementing measures, with the overall package to be applied by the end of 2015.

²¹ 78 FR at 45343.

²² 78 FR at 45343.

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the corollary requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including, but not limited to:

- The comprehensiveness of those requirement(s),
- The scope and objectives of the relevant regulatory requirement(s),
- The comprehensiveness of the foreign regulator’s supervisory compliance program, and
- The home jurisdiction’s authority to support and enforce its oversight of the registrant.²³

In making a comparability determination, the Commission takes an “outcome-based” approach. An “outcome-based” approach means that when evaluating whether a foreign jurisdiction’s regulatory requirements are comparable to, and as comprehensive as, the corollary areas of the CEA and Commission regulations, the Commission ultimately focuses on regulatory outcomes (i.e., the home jurisdiction’s requirements do not have to be identical).²⁴ This approach recognizes that foreign regulatory systems differ and their approaches vary and may differ from how the Commission chose to address an issue, but that the foreign jurisdiction’s regulatory requirements nonetheless

²³ 78 FR at 45343.

²⁴ 78 FR at 45343. The Commission’s substituted compliance program would generally be available for SDR Reporting, as outlined in the Guidance, only if the Commission has direct access to all of the data elements that are reported to a foreign trade repository pursuant to the substituted compliance program. Thus, direct access to swap data is a threshold matter to be addressed in a comparability evaluation for SDR Reporting. Moreover, the Commission explains in the Guidance that, due to its technical nature, a comparability evaluation for SDR Reporting “will generally entail a detailed comparison and technical analysis.” A more particularized analysis will generally be necessary to determine whether data stored in a foreign trade repository provides for effective Commission use, in furtherance of the regulatory purposes of the Dodd-Frank Act. See 78 FR at 45345.

achieve the regulatory outcome sought to be achieved by a certain provision of the CEA or Commission regulation.

In doing its comparability analysis the Commission may determine that no comparability determination can be made²⁵ and that the non-U.S. SD or non-U.S. MSP, U.S. bank that is an SD or MSP with respect to its foreign branches, or non-registrant, to the extent applicable under the Guidance, may be required to comply with the CEA and Commission regulations.

The starting point in the Commission's analysis is a consideration of the regulatory objectives of the foreign jurisdiction's regulation of swaps and swap market participants. As stated in the Guidance, jurisdictions may not have swap specific regulations in some areas, and instead have regulatory or supervisory regimes that achieve comparable and comprehensive regulation to the Dodd-Frank Act requirements, but on a more general, entity-wide, or prudential, basis.²⁶ In addition, portions of a foreign regulatory regime may have similar regulatory objectives, but the means by which these objectives are achieved with respect to swaps market activities may not be clearly defined, or may not expressly include specific regulatory elements that the Commission concludes are critical to achieving the regulatory objectives or outcomes required under the CEA and the Commission's regulations. In these circumstances, the Commission will work with the regulators and registrants in these jurisdictions to

²⁵ A finding of comparability may not be possible for a number of reasons, including the fact that the foreign jurisdiction has not yet implemented or finalized particular requirements.

²⁶ 78 FR at 45343.

consider alternative approaches that may result in a determination that substituted compliance applies.²⁷

Finally, the Commission will generally rely on an applicant's description of the laws and regulations of the foreign jurisdiction in making its comparability determination. The Commission considers an application to be a representation by the applicant that the laws and regulations submitted are in full force and effect, that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of such laws and regulations encompasses the swaps activities²⁸ of SDs and MSPs²⁹ in the relevant jurisdictions.³⁰ Further, as stated in the

²⁷ As explained in the Guidance, such "approaches used will vary depending on the circumstances relevant to each jurisdiction. One example would include coordinating with the foreign regulators in developing appropriate regulatory changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the foreign regulators or legislative bodies. As another example, the Commission may, after consultation with the appropriate regulators and market participants, include in its substituted compliance determination a description of the means by which certain swaps market participants can achieve substituted compliance within the construct of the foreign regulatory regime. The identification of the means by which substituted compliance is achieved would be designed to address the regulatory objectives and outcomes of the relevant Dodd-Frank Act requirements in a manner that does not conflict with a foreign regulatory regime and reduces the likelihood of inconsistent regulatory obligations. For example, the Commission may specify that [SDs] and MSPs in the jurisdiction undertake certain recordkeeping and documentation for swap activities that otherwise is only addressed by the foreign regulatory regime with respect to financial activities generally. In addition, the substituted compliance determination may include provisions for summary compliance and risk reporting to the Commission to allow the Commission to monitor whether the regulatory outcomes are being achieved. By using these approaches, in the interest of comity, the Commission would seek to achieve its regulatory objectives with respect to the Commission's registrants that are operating in foreign jurisdictions in a manner that works in harmony with the regulatory interests of those jurisdictions." 78 FR at 45343-44.

²⁸ "Swaps activities" is defined in Commission regulation 23.600(a)(7) to mean, "with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives." The Commission's regulations under 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

²⁹ No SD or MSP that is not legally required to comply with a law or regulation determined to be comparable may voluntarily comply with such law or regulation in lieu of compliance with the CEA and the relevant Commission regulation. Each SD or MSP that seeks to rely on a comparability determination is responsible for determining whether it is subject to the laws and regulations found comparable. Currently, there are no MSPs organized outside the U.S. and the Commission therefore cautions any non-financial entity organized outside the U.S. and applying for registration as an MSP to carefully consider whether the laws and regulations determined to be comparable herein are applicable to such entity.

Guidance, the Commission expects that an applicant would notify the Commission of any material changes to information submitted in support of a comparability determination (including, but not limited to, changes in the relevant supervisory or regulatory regime) as, depending on the nature of the change, the Commission's comparability determination may no longer be valid.³¹

The Guidance provided a detailed discussion of the Commission's policy regarding the availability of substituted compliance³² for the Internal Business Conduct Requirements.³³

V. Supervisory Arrangement

In the Guidance, the Commission stated that, in connection with a determination that substituted compliance is appropriate, it would expect to enter into an appropriate memorandum of understanding ("MOU") or similar arrangement³⁴ with the relevant

³⁰ The Commission has provided the relevant foreign regulator(s) with opportunities to review and correct the applicant's description of such laws and regulations on which the Commission will base its comparability determination. The Commission relies on the accuracy and completeness of such review and any corrections received in making its comparability determinations. A comparability determination based on an inaccurate description of foreign laws and regulations may not be valid.

³¹ 78 FR at 45345.

³² See 78 FR at 45348-50. The Commission notes that registrants and other market participants are responsible for determining whether substituted compliance is available pursuant to the Guidance based on the comparability determination contained herein (including any conditions or exceptions), and its particular status and circumstances.

³³ This notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in the EU to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in the EU. This notice also does not address capital adequacy because the Commission has not yet finalized rules for SDs and MSPs in this area, nor SDR Reporting. The Commission may provide a comparability determination with respect to these requirements at a later date or in a separate notice.

³⁴ An MOU is one type of arrangement between or among regulators. Supervisory arrangements could include, as appropriate, cooperative arrangements that are memorialized and executed as addenda to

foreign regulator(s). Although existing arrangements would indicate a foreign regulator's ability to cooperate and share information, "going forward, the Commission and relevant foreign supervisor(s) would need to establish supervisory MOUs or other arrangements that provide for information sharing and cooperation in the context of supervising [SDs] and MSPs."³⁵

The Commission is in the process of developing its registration and supervision regime for provisionally-registered SDs and MSPs. This new initiative includes setting forth supervisory arrangements with authorities that have joint jurisdiction over SDs and MSPs that are registered with the Commission and subject to U.S. law. Given the developing nature of the Commission's regime and the fact that the Commission has not negotiated prior supervisory arrangements with certain authorities, the negotiation of supervisory arrangements presents a unique opportunity to develop close working relationships between and among authorities, as well as highlight any potential issues related to cooperation and information sharing.

Accordingly, the Commission is negotiating such a supervisory arrangement with each applicable foreign regulator of an SD or MSP. The Commission expects that the arrangement will establish expectations for ongoing cooperation, address direct access to information,³⁶ provide for notification upon the occurrence of specified events,

existing MOUs or, for example, as independent bilateral arrangements, statements of intent, declarations, or letters.

³⁵ 78 FR at 45344.

³⁶ Section 4s(j)(3) and (4) of the CEA and Commission regulation 23.606 require a registered SD or MSP to make all records required to be maintained in accordance with Commission regulation 1.31 available promptly upon request to, among others, representatives of the Commission. See also 7 U.S.C. 6s(f); 17 CFR 23.203. In the Guidance, the Commission states that it "reserves this right to access records held by registered [SDs] and MSPs, including those that are non-U.S. persons who may comply with the Dodd-Frank recordkeeping requirement through substituted compliance." 78 FR at 45345 n. 472; see also id. at

memorialize understandings related to on-site visits,³⁷ and include protections related to the use and confidentiality of non-public information shared pursuant to the arrangement.

These arrangements will establish a roadmap for how authorities will consult, cooperate, and share information. As with any such arrangement, however, nothing in these arrangements will supersede domestic laws or resolve potential conflicts of law, such as the application of domestic secrecy or blocking laws to regulated entities.

VI. Comparability Determination and Analysis

The following section describes the requirements imposed by specific sections of the CEA and the Commission's regulations for the Internal Business Conduct Requirements that are the subject of this comparability determination, and the Commission's regulatory objectives with respect to such requirements. Immediately following a description of the requirement(s) and regulatory objective(s) of the specific Internal Business Conduct Requirements that the requestor submitted for a comparability determination, the Commission provides a description of the foreign jurisdiction's comparable laws, regulations, or rules and whether such laws, regulations, or rules meet the applicable regulatory objective.

The Commission's determinations in this regard and the discussion in this section are intended to inform the public of the Commission's views regarding whether the

45342 n. 461 (affirming the Commission's authority under the CEA and its regulations to access books and records held by registered SDs and MSPs as "a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto").

³⁷ The Commission retains its examination authority, both during the application process as well as upon and after registration of an SD or MSP. See 78 FR at 45342 (stating Commission policy that "eligible entities may comply with a substituted compliance regime under certain circumstances, subject, however, to the Commission's retention of its examination authority") and 45344 n. 471 (stating that the "Commission may, as it deems appropriate and necessary, conduct an on-site examination of the applicant").

foreign jurisdiction's laws, regulations, or rules may be comparable and comprehensive as those requirements in the Dodd-Frank Act (and Commission regulations promulgated thereunder) and therefore, may form the basis of substituted compliance. In turn, the public (in the foreign jurisdiction, in the United States, and elsewhere) retains its ability to present facts and circumstances that would inform the determinations set forth in this notice.

As was stated in the Guidance, the Commission recognizes the complex and dynamic nature of the global swap market and the need to take an adaptable approach to cross-border issues, particularly as it continues to work closely with foreign regulators to address potential conflicts with respect to each country's respective regulatory regime. In this regard, the Commission may review, modify, or expand the determinations herein in light of comments received and future developments.

A. Chief Compliance Officer (§ 3.3).

Commission Requirement: Implementing section 4s(k) of the CEA, Commission regulation 3.3 generally sets forth the following requirements for SDs and MSPs:

- An SD or MSP must designate an individual as Chief Compliance Officer (“CCO”);
- The CCO must have the responsibility and authority to develop the regulatory compliance policies and procedures of the SD or MSP;
- The CCO must report to the board of directors or the senior officer of the SD or MSP;
- Only the board of directors or a senior officer may remove the CCO;

- The CCO and the board of directors must meet at least once per year;
- The CCO must have the background and skills appropriate for the responsibilities of the position;
- The CCO must not be subject to disqualification from registration under sections 8a(2) or (3) of the CEA;
- Each SD and MSP must include a designation of a CCO in its registration application;
- The CCO must administer the regulatory compliance policies of the SD or MSP;
- The CCO must take reasonable steps to ensure compliance with the CEA and Commission regulations, and resolve conflicts of interest;
- The CCO must establish procedures for detecting and remediating non-compliance issues;
- The CCO must annually prepare and sign an “annual compliance report” containing: (i) a description of policies and procedures reasonably designed to ensure compliance; (ii) an assessment of the effectiveness of such policies and procedures; (iii) a description of material non-compliance issues and the action taken; (iv) recommendations of improvements in compliance policies; and (v) a certification by the CCO or chief executive officer that, to the best of such officer’s knowledge and belief, the annual report is accurate and complete under penalty of law; and
- The annual compliance report must be furnished to the CFTC within 90 days after the end of the fiscal year of the SD or MSP, simultaneously with its annual financial condition report.

Regulatory Objective: The Commission believes that compliance by SDs and MSPs with the CEA and the Commission’s rules greatly contributes to the protection of customers, orderly and fair markets, and the stability and integrity of the market intermediaries registered with the Commission. The Commission expects SDs and MSPs to strictly comply with the CEA and the Commission’s rules and to devote sufficient resources to ensuring such compliance. Thus, through its CCO rule, the Commission seeks to ensure firms have designated a qualified individual as CCO that reports directly to the board of directors or the senior officer of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually to the Commission and the board or senior officer on compliance of the firm.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as section 4s(k) of the CEA and Commission regulation 3.3.

MiFID Articles 13(2), 13(3) and 18 set forth the general obligation for investment firms (which would include SDs) to establish adequate policies and procedures to ensure compliance with requirements and to identify and properly manage conflicts of interests.

MiFID implementing measure (Commission Directive “MiFID L2D”) Articles 5, 6, 9, 21 to 23 clarify, along with ESMA guidelines, the application of some aspects of the MiFID articles, to ensure common, uniform, and consistent application of MiFID and the MiFID L2D across the EU. The main principles are the following:

- Investment firms must appoint a person as compliance officer (“CO”) responsible for the compliance function (“CF”);
- The CO must have sufficiently broad knowledge/experience and high level of expertise to assume responsibility for the CF and ensure it is effective;
- Written reports must be sent to senior management (which includes boards of directors) on a regular basis (at least annually as well as on an ad-hoc basis when significant compliance matters are discovered);
- The CO must only be appointed and replaced by senior management or supervisory function;
- The CO, but also compliance staff, must have specific knowledge, skills and expertise relevant to the tasks and to the business of the firm;
- Supervisors must ensure compliance with above requirements in the authorization process of investment firms and during on-going supervision;
- CF, under the responsibility of the CO, must monitor and assess the adequacy and effectiveness of measures and procedures to ensure compliance with regulatory obligations and to address any deficiencies, including the obligation to identify and manage conflicts of interests and maintain effective conflicts of interest policies;
- Written report to address, at least annually: the description of implementation and effectiveness of the overall control environment; the summary of major findings of the review of policies and procedures; the summary of inspections and reviews carried out; the risk identified; and the advice on any necessary remedial action;
- The CF must be involved in all material non-routine correspondence with supervisors;

- The CF must be involved in all significant modifications of the organization of the investment firm;
- The CF must be independent;
- Senior management retains ultimate responsibility to ensure firms' compliance with obligations; and
- Investment firms must arrange for all records necessary to enable supervisors to monitor compliance with requirements.

Commission Determination: The Commission finds that the MiFID standards specified above are generally identical in intent to § 3.3 by seeking to ensure firms have designated a qualified individual as the compliance officer that reports directly to a sufficiently senior function of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually on compliance of the firm.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the CCO requirements of MiFID are comparable to and as comprehensive as § 3.3, with the exception of § 3.3(f) concerning certifying and furnishing an annual compliance report to the Commission.

Notwithstanding that the Commission has not determined that the requirements of MiFID are comparable to and as comprehensive as § 3.3(f), any SD or MSP to which both § 3.3 and the MiFID standards specified above are applicable would generally be deemed to be in compliance with § 3.3(f) if that SD or MSP complies with the MiFID

standards specified above, subject to certifying and furnishing the Commission with the annual report required under the MiFID standards specified above in accordance with § 3.3(f). The Commission notes that it generally expects registrants to submit required reports to the Commission in the English language.

B. Risk Management Duties (§§ 23.600 – 23.609)

Section 4s(j) of the CEA requires each SD and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.³⁸

The Commission adopted regulations 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606 to implement the statute.³⁹ The Commission also adopted regulation 23.609, which requires certain risk management procedures for SDs or MSPs that are clearing members of a derivatives clearing organization (“DCO”).⁴⁰ Collectively, these requirements help to establish a robust and comprehensive internal risk management program for SDs and MSPs with respect to their swaps activities,⁴¹ which is critical to effective systemic risk

³⁸ 7 U.S.C. § 6s(j).

³⁹ See Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128 (April 3, 2012) (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, and general information availability, respectively).

⁴⁰ See Customer Documentation Rule, 77 FR 21278. Also, SDs must comply with Commission regulation 23.608, which prohibits SD providing clearing services to customers from entering into agreements that would: (i) disclose the identity of a customer’s original executing counterparty; (ii) limit the number of counterparties a customer may trade with; (iii) impose counterparty-based position limits; (iv) impair a customer’s access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (v) prevent compliance with specified time frames for acceptance of trades into clearing.

⁴¹ “Swaps activities” is defined in Commission regulation 23.600(a)(7) to mean, “with respect to a registrant, such registrant’s activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.” The Commission’s regulations under 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

management for the overall swaps market. In making its comparability determination with regard to these risk management duties, the Commission will consider each regulation individually.⁴²

1. Risk Management Program for SDs and MSPs (§ 23.600)

Commission Requirement: Implementing section 4s(j)(2) of the CEA, Commission regulation 23.600 generally requires that:

- Each SD or MSP must establish and enforce a risk management program consisting of a system of written risk management policies and procedures designed to monitor and manage the risks associated with the swap activities of the firm, including without limitation, market, credit, liquidity, foreign currency, legal, operational, and settlement risks, and furnish a copy of such policies and procedures to the CFTC upon application for registration and upon request;
- The SD or MSP must establish a risk management unit independent from the business trading unit;
- The risk management policies and procedures of the SD or MSP must be approved by the firm's governing body;
- Risk tolerance limits and exceptions therefrom must be reviewed and approved quarterly by senior management and annually by the governing body;
- The risk management program must have a system for detecting breaches of risk tolerance limits and alerting supervisors and senior management, as appropriate;

⁴² As stated above, this notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in the EU to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in the EU.

- The risk management program must account for risks posed by affiliates and be integrated at the consolidated entity level;
- The risk management unit must provide senior management and the governing body with quarterly risk exposure reports and upon detection of any material change in the risk exposure of the SD or MSP;
- Risk exposure reports must be furnished to the CFTC within five business days following provision to senior management;
- The risk management program must have a new product policy for assessing the risks of new products prior to engaging in such transactions;
- The risk management program must have policies and procedures providing for trading limits, monitoring of trading, processing of trades, and separation of personnel in the trading unit from personnel in the risk management unit; and
- The risk management program must be reviewed and tested at least annually and upon any material change in the business of the SD or MSP.

Regulatory Objective: Through the required system of risk management, the Commission seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. To this end, the Commission believes the risk management program of an SD or MSP must contain at least the following critical elements:

- Identification of risk categories;
- Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;

- An independent risk management unit to administer a risk management program;
- and
- Periodic oversight of risk exposures by senior management and the governing body.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as section 4s(j)(2) of the CEA and Commission regulation 23.600.

- Under MiFID Article 13(5) & MiFID L2D Article 5, investment firms must have effective procedures for risk assessment, effective control, and safeguard arrangements for information processing systems, sound administrative and accounting procedures, and internal control mechanisms.
- Under MiFID L2D Article 6, investment firms (including SDs) must, subject to a proportionality principle dependent on the size and nature of a firm's business, establish and maintain an independent risk management function that is responsible for the implementation of risk management policies and procedures and that provides reports and advice to senior management regarding risk management.
- MiFID L2D Article 9: Senior management (which includes boards of directors) must take responsibility for firms' compliance with regulatory obligations including risk management.
- MiFID L2D Article 9: Senior management must receive on a frequent basis, and at least annually, written reports on risk management issues, including any appropriate action taken in the event of deficiencies;

- MiFID L2D Article 7: Investment firms must identify the risks relating to the firms' activities, processes and systems, and set the level of risk tolerated by the firm in appropriate instances; must adopt effective arrangements, processes, and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of the established level of risk tolerance; must monitor the adequacy and effectiveness of its risk management policies and procedures, the level of compliance with arrangements, processes and mechanisms for risk management; and must monitor the adequacy and effectiveness of measures taken to address any deficiencies. The risk management strategy should address credit and counterparty risk; residual risk; market risk; interest rate risk; operational risk; liquidity risk; securitization risk; concentration risk; and risk of excessive leverage.

- Directive 2002/87/EC Article 9: In the case of financial conglomerates, risk management processes must include approval and periodical review of the strategies and policies by governing bodies with respect to all the risks assumed; adequate capital adequacy policies to anticipate impacts on risk profiles and capital requirements; risk monitoring and controls at the level of the conglomerates.

- ESMA Guidelines on compliance function requirements (ESMA/2012/388) specify that the assessment of compliance risk should involve the compliance function, including in the case of new business lines or new financial products. Identified risks should be reviewed on a regular basis as well as ad-hoc when necessary to ensure that any emerging risks are taken into consideration. A monitoring program covering all areas of the investment firm's activities should ensure that compliance risk is

comprehensively monitored. Specific measures ensure the effectiveness, the permanence and the independence of the compliance function.

- MiFID L2D Articles 21 to 23: Requirements on conflicts of interests include the obligation to adopt measures to ensure the appropriate level of independence to any person working in the firm. This includes measures preventing or controlling the exchange of information, separating the supervision of relevant persons, preventing or limiting the possibility for a person to exercise inappropriate influence over others. Furthermore, firms must ensure that performance of multiple functions does not prevent persons from acting soundly, honestly, and professionally.

- MiFID Article 50: Supervisors can access documents for the discharge of their supervisory duties.

- CRD Annex V: Credit institutions and investment firms must have in place risk management procedures that cover credit, operational, counterparty, market, concentration, securitization, liquidity and interest rate risk.

- CRD Article 22: Credit institution's conformity with regulation is the responsibility of the institution's management body and is subject to ongoing supervisory review.⁴³

Commission Determination: The Commission finds that the MiFID, ESMA, and CRD standards specified above are generally identical in intent to § 23.600 by

⁴³ The current version of CRD will soon be replaced by CRD IV. CRD IV entered into force on June 28, 2013, and shall apply in most of its parts from January 1, 2014. The new reference is Article 74 and there will be additional detailed technical rules specifying the arrangements, processes and mechanisms that must be adopted to fulfill this requirement. Article 88 of Directive 2013/36/EU specifies that “the management body defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of an institution.” Article 76 specifies tasks assigned to the management body as regards risk management.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:EN:PDF>.

requiring a system of risk management that seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. Specifically, the Commission finds that the MiFID, ESMA, and CRD standards specified above comprehensively require SDs and MSPs to establish risk management programs containing the following critical elements:

- Identification of risk categories;
 - Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;
 - An independent risk management unit to administer a risk management program;
- and
- Periodic oversight of risk exposures by senior management and the governing body.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the risk management program requirements of MiFID, ESMA, and CRD, as specified above, are comparable to and as comprehensive as § 23.600, with the exception of § 23.600(c)(2) concerning the requirement that each SD and MSP produce a quarterly risk exposure report and provide such report to its senior management, governing body, and the Commission.

Notwithstanding that the Commission has not determined that the requirements of MiFID, ESMA, and CRD are comparable to and as comprehensive as § 23.600(c)(2), any SD or MSP to which both § 23.600 and the MiFID, ESMA, and CRD standards specified above are applicable would generally be deemed to be in compliance with § 23.600(c)(2)

if that SD or MSP complies with the MiFID, ESMA, and CRD standards specified above, subject to compliance with the requirement that it produce quarterly risk exposure reports and provide such reports to its senior management, governing body, and the Commission in accordance with § 23.600(c)(2). The Commission notes that it generally expects reports furnished to the Commission by registrants to be in the English language.

2. Monitoring of Position Limits (§ 23.601)

Commission Requirement: Implementing section 4s(j)(1) of the CEA, Commission regulation 23.601 requires each SD or MSP to establish and enforce written policies and procedures that are reasonably designed to monitor for, and prevent violations of, applicable position limits established by the Commission, a designated contract market (“DCM”), or a swap execution facility (“SEF”).⁴⁴ The policies and procedures must include an early warning system and provide for escalation of violations to senior management (including the firm’s governing body).

Regulatory Objective: Generally, position limits are implemented to ensure market integrity, fairness, orderliness, and accurate pricing in the commodity markets. Commission regulation 23.601 thus seeks to ensure that SDs and MSPs have established the necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by the Commission, a DCM, or a SEF. As part of its Risk Management Program, § 23.601 is intended to ensure that established position limits are not breached by the SD or MSP.

⁴⁴ The setting of position limits by the Commission, a DCM, or a SEF is subject to requirements under the CEA and Commission regulations other than § 23.601. The setting of position limits and compliance with such limits is not subject to the Commission’s substituted compliance regime.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as section 4s(j)(1) of the CEA and Commission regulation 23.601.

The applicant requests that the Commission look to the general risk management function requirements outlined in subsection VI(B)(1) (Risk Management Program) above and the general compliance function requirements outlined in subsection VI(A) (Chief Compliance Officer) above for comparable EU law and regulations that would require an SD or MSP to monitor for and comply with applicable position limits. For example:

- MiFID L2D: A firm's compliance function, under the responsibility of the compliance officer, must monitor and assess the adequacy and effectiveness of measures and procedures to ensure compliance with regulatory obligations and to address any deficiencies, including obligations to identify and manage conflicts of interests and maintain effective conflicts of interest policies; and
- MiFID L2D Article 9: Senior management (which includes boards of directors) must take responsibility for firms' compliance with regulatory obligations including risk management.

The applicant states that the foregoing MiFID standards to monitor the effectiveness of procedures to ensure compliance with regulatory obligations includes regulatory obligations of an SD or MSP, that is subject to such MiFID standards, to comply with applicable standards under the CEA, Commission regulations, and position limits set by the Commission, a DCM, or a SEF.

Commission Determination: The Commission finds that the MiFID standards specified above are generally identical in intent to § 23.601 by requiring SDs and MSPs to establish necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by applicable laws and regulations, including those of the Commission, a DCM, or a SEF. Specifically, the Commission finds that the MiFID standards specified above, while not specific to the issue of position limit compliance, nevertheless comprehensively require SDs and MSPs to monitor for regulatory compliance generally, which includes monitoring for compliance with position limits set pursuant to applicable law and the responsibility of senior management (including the board of directors) for such compliance.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the compliance monitoring requirements of MiFID, as specified above, are comparable to and as comprehensive as § 23.601. For the avoidance of doubt, the Commission notes that this determination may not be relied on to relieve an SD or MSP from its obligation to strictly comply with any applicable position limit established by the Commission, a DCM, or a SEF.

3. Diligent Supervision (§ 23.602)

Commission Requirement: Commission regulation 23.602 implements section 4s(h)(1)(B) of the CEA and requires each SD and MSP to establish a system to diligently supervise all activities relating to its business performed by its partners, members, officers, employees, and agents. The system must be reasonably designed to achieve compliance with the CEA and CFTC regulations. Commission regulation 23.602 requires that the supervisory system must specifically designate qualified persons with

authority to carry out the supervisory responsibilities of the SD or MSP for all activities relating to its business as an SD or MSP.

Regulatory Objective: The Commission's diligent supervision rule seeks to ensure that SDs and MSPs strictly comply with the CEA and the Commission's rules. To this end, through § 23.602, the Commission seeks to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as section 4s(h)(1)(B) of the CEA and Commission regulation 23.602.

Under MiFID Article 13, MiFID L2D Articles 5, 6, 11, and 12, and ESMA/2012/388, firms must establish policies and procedures sufficient to ensure compliance of the firm, as well as its managers, employees and agents, with all of their compliance obligations as well as rules on personal transactions by these persons. The applicant represents to the Commission that the compliance obligations of firms that are subject to MiFID would cover those of an SD or MSP under the CEA and the Commission's regulations.

Under MiFID Article 9, directors are subject to fit and proper criteria. Under MiFID Article 13, firms must establish and maintain decision-making processes and an organizational structure specifying reporting lines and allocate functions and

responsibilities; personnel must have skills, knowledge and expertise necessary for the discharge of their responsibilities; and internal control mechanisms must be maintained to secure compliance as well as internal reporting and communication of information at all relevant levels of the firm.

Commission Determination: The Commission finds that the MiFID standards specified above are generally identical in intent to § 23.602 because such standards seek to ensure that SDs and MSPs strictly comply with applicable law, which would include the CEA and the Commission's regulations. Through the MiFID standards specified above, EU laws and regulations seek to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with applicable law, which would include the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the internal supervision requirements of MiFID, as specified above, are comparable to and as comprehensive as § 23.602.

4. Business Continuity and Disaster Recovery (§ 23.603)

Commission Requirement: To ensure the proper functioning of the swaps markets and the prevention of systemic risk more generally, Commission regulation 23.603 requires each SD and MSP, as part of its risk management program, to establish a business continuity and disaster recovery plan that includes procedures for, and the maintenance of, back-up facilities, systems, infrastructure, personnel, and other

resources to achieve the timely recovery of data and documentation and to resume operations generally within the next business day after the disruption.

Regulatory Objective: Commission regulation 23.603 is intended to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, this requirement seeks to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan within one business day, if necessary.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as Commission regulation 23.603.

- Under MiFID L2D Article 5(3), firms must establish, implement, and maintain an adequate business continuity policy aimed at insuring the preservation of essential data and functions, the maintenance of services, and the timely recovery of such data and functions and timely resumption of services.

- Under MiFID Article 13(4), firms must take reasonable steps to ensure continuity and regularity in the performance of investment services and activities, including employing appropriate systems, resources, and procedures to accomplish this requirement.

Commission Determination: The Commission finds that the MiFID standards specified above are generally identical in intent to § 23.603 because such standards seek to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, the Commission

finds that the MiFID standards specified above seek to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan in a timely manner.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the business continuity and disaster recovery requirements of MiFID, as specified above, are comparable to and as comprehensive as § 23.603.

5. Conflicts of Interest (§ 23.605)

Commission Requirement: Section 4s(j)(5) of the CEA and Commission regulation 23.605(c) generally require each SD or MSP to establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or swap are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision.

In addition, section 4s(j)(5) of the CEA and Commission regulation 23.605(d)(1) generally prohibits an SD or MSP from directly or indirectly interfering with or attempting to influence the decision of any clearing unit of any affiliated clearing member of a DCO to provide clearing services and activities to a particular customer, including:

- Whether to offer clearing services to a particular customer;
- Whether to accept a particular customer for clearing derivatives;
- Whether to submit a customer's transaction to a particular DCO;
- Whether to set or adjust risk tolerance levels for a particular customer; or

- Whether to set a customer's fees based on criteria other than those generally available and applicable to other customers.

Commission regulation 23.605(d)(2) generally requires each SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of any affiliated clearing member of a DCO to reasonably ensure compliance with the Act and the prohibitions set forth in § 23.605(d)(1) outlined above.

The Commission observes that § 23.605(d) works in tandem with Commission regulation 1.71, which requires futures commission merchants ("FCMs") that are clearing members of a DCO and affiliated with an SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of the FCM to reasonably ensure compliance with the Act and the prohibitions set forth in § 1.71(d)(1), which are the same as the prohibitions set forth in § 23.605(d)(1) outlined above.

Finally, § 23.605(e) requires that each SD or MSP have policies and procedures that mandate the disclosure to counterparties of material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM or to clear a derivative through a DCO.

Regulatory Objective: Commission regulation 23.605(c) seeks to ensure that research provided to the general public by an SD or MSP is unbiased and free from the influence of the interests of an SD or MSP arising from the SD's or MSP's trading business.

In addition, § 23.605(d) (working in tandem with § 1.71) seeks to ensure open access to the clearing of swaps by requiring that access to and the provision of clearing services provided by an affiliate of an SD or MSP are not influenced by the interests of an SD's or MSP's trading business.

Finally, § 23.605(e) seeks to ensure equal access to trading venues and clearinghouses, as well as orderly and fair markets, by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as Commission regulation 23.605(c).

- MiFID Articles 13(3) and 18 require that SDs maintain and operate effective organizational and administrative arrangements with a view to preventing conflicts of interest from adversely affecting the interests of its clients.
- Under MiFID L2D Articles 21 to 23, SDs are obligated to adopt measures to ensure the appropriate level of independence of any person working in the firm. This includes measures preventing or controlling the exchange of information, separating the supervision of relevant persons, and preventing or limiting the possibility for a person to exercise inappropriate influence over others. Furthermore, firms must ensure that performance of multiple functions does not prevent persons from acting soundly, honestly, and professionally.

- Under MiFID L2D Articles 24 to 25, SDs must maintain and operate effective organizational and administrative arrangements and take all reasonable steps designed to prevent conflicts of interest from adversely affecting the interests of its clients.
- Under MiFID Articles 18 and MiFID L2D Article 22, SDs must develop a written conflicts of interest policy appropriate to the size and organization of the firm that identifies circumstances that might give rise to conflicts entailing a material risk of damage to the interests of one or more clients and specify procedures to be followed to manage such conflicts. The general conflicts policy has to be disclosed to clients. Disclosure is also needed when organizational arrangements to manage conflicts are not sufficient to ensure, with reasonable confidence, that the risk of damage to client interests will be prevented.
- Under MiFID L2D Article 25, an SD that prepares or disseminates research recommendations must take reasonable care to ensure that research recommendations are fairly presented and must disclose its interests or indicate conflicts of interest concerning relevant investments.
- Under MiFID L2D Article 25, in addition to the conflicts of interest requirements set out above, steps must be taken to ensure that restrictions are in place to avoid conflicts with respect to research personnel (e.g., financial analysts), including restrictions on personal account dealing and inducements.
- Under MiFID L2D Article 24, research recommendations must also include a disclosure of interests or indicate conflicts of interests concerning the relevant investments.

The applicant states that the foregoing MiFID standards would require any SD or MSP that is subject to such MiFID standards to resolve or mitigate conflicts of interests in the provision of clearing services by a clearing member that is linked to that SD or MSP, or conflicts of interests in the execution of a derivative by a client on a particular execution venue, including an eligible SEF or DCM, or conflicts of interests in the clearing of a derivative through a CCP, including an eligible DCO, through measures including appropriate information firewalls and disclosures.

Commission Determination: The Commission finds that the MiFID standards specified above with respect to conflicts of interest that may arise in producing or distributing research are generally identical in intent to § 23.605(c) because such standards seek to ensure that research provided to the general public by an SD is unbiased and free from the influence of the interests of an SD arising from the SD's trading business.

With respect to conflicts of interest that may arise in the provision of clearing services by an affiliate of an SD or MSP, the Commission further finds that although the general conflicts of interest prevention requirements under the MiFID standards specified above do not require with specificity that access to and the provision of clearing services provided by an affiliate of an SD or MSP not be improperly influenced by the interests of an SD's or MSP's trading business, such general requirements would require prevention and remediation of such improper influence when recognized or discovered. Thus such standards would ensure open access to clearing.

Finally, although not as specific as the requirements of § 23.605(e) (Undue influence on counterparties), the Commission finds that the general disclosure

requirements of the MiFID standards specified above would ensure equal access to trading venues and clearinghouses by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the requirements found in the MiFID standards specified above in relation to conflicts of interest are comparable to and as comprehensive as § 23.605.

6. Availability of Information for Disclosure and Inspection (§ 23.606)

Commission Requirement: Commission regulation 23.606 implements sections 4s(j)(3) and (4) of the CEA, and requires each SD and MSP to disclose to the Commission, and an SD's or MSP's U.S. prudential regulator (if any) comprehensive information about its swap activities, and to establish and maintain reliable internal data capture, processing, storage, and other operational systems sufficient to capture, process, record, store, and produce all information necessary to satisfy its duties under the CEA and Commission regulations. Such systems must be designed to provide such information to the Commission and an SD's or MSP's U.S. prudential regulator within the time frames set forth in the CEA and Commission regulations and upon request.

Regulatory Objective: Commission regulation 23.606 seeks to ensure that each SD and MSP captures and maintains comprehensive information about their swap activities, and is able to retrieve and disclose such information to the Commission and its U.S. prudential regulator, if any, as necessary for compliance with the CEA and the

Commission's regulations and for purposes of Commission oversight, as well as oversight by the SD's or MSP's U.S. prudential regulator, if any.

The Commission observes that it would be impossible to meet the regulatory objective of § 23.606 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.606 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as Commission regulation 23.606.

Under MiFID Article 13(6) & 25(2) & 50, investment firms are required to maintain adequate and orderly records of their business and internal organization. Firms must maintain at the disposal of the regulator, for at least five years, the relevant data relating to their transactions in financial instruments. Among other things, supervisors have the authority to access any document in any form whatsoever and to receive a copy of it, to demand information from any person, and to carry out on-site inspections.

Commission Determination: The Commission finds that the MiFID standards specified above are generally identical in intent to § 23.606 because such standards seek to ensure that each SD and MSP captures and stores comprehensive information about

their swap activities, and are able to retrieve and disclose such information as necessary for compliance with applicable law and for purposes of regulatory oversight.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the requirements of MiFID with respect to the availability of information for inspection and disclosure, as specified above, are comparable to, and as comprehensive as, § 23.606, with the exception of § 23.606(a)(2) concerning the requirement that an SD or MSP make information required by § 23.606(a)(1) available promptly upon request to Commission staff and the staff of an applicable prudential regulator. The applicant has not submitted any provision of law or regulations applicable in the EU upon which the Commission could make a finding that SDs and MSPs would be required to retrieve and disclose comprehensive information about their swap activities to the Commission or any U.S. prudential regulator as necessary for compliance with the CEA and Commission regulations, and for purposes of Commission oversight and the oversight of any U.S. prudential regulator.

Notwithstanding that the Commission has not determined that the requirements of MiFID are comparable to and as comprehensive as § 23.606(a)(2), any SD or MSP to which both § 23.606 and the MiFID standards specified above are applicable would generally be deemed to be in compliance with § 23.606(a)(2) if that SD or MSP complies with the MiFID standards specified above, subject to compliance with the requirement that it produce information to Commission staff and the staff of an applicable U.S. prudential regulator in accordance with § 23.606(a)(2).

7. Clearing Member Risk Management (§ 23.609)

Commission Requirement: Commission regulation 23.609 generally requires each SD or MSP that is a clearing member of a DCO to:

- Establish risk-based limits based on position size, order size, margin requirements, or similar factors;
- Screen orders for compliance with the risk-based limits;
- Monitor for adherence to the risk-based limits intra-day and overnight;
- Conduct stress tests under extreme but plausible conditions of all positions at least once per week;
- Evaluate its ability to meet initial margin requirements at least once per week;
- Evaluate its ability to meet variation margin requirements in cash at least once per week;
- Evaluate its ability to liquidate positions it clears in an orderly manner, and estimate the cost of liquidation; and
- Test all lines of credit at least once per year.

Regulatory Objective: Through Commission regulation 23.609, the Commission seeks to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds. Effective risk management by SDs and MSPs that are clearing members is essential to achieving these objectives. A failure of risk management can cause a clearing member to become insolvent and default to a DCO. Such default can disrupt the markets and the clearing system and harm customers.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are

in full force and effect in the EU, and comparable to and as comprehensive as Commission regulation 23.609.

- Under MiFID Article 13(5) & MiFID L2D Article 5, investment firms must have effective procedures for risk assessment, effective control, and safeguard arrangements for information processing systems, sound administrative and accounting procedures, and internal control mechanisms.
- Under MiFID L2D Article 6, investment firms must, subject to a proportionality principle dependent on the size and nature of a firm's business, establish and maintain an independent risk management function that is responsible for the implementation of risk management policies and procedures and that provides reports and advice to senior management regarding risk management.
- MiFID L2D Article 9: Senior management (which includes boards of directors) must take responsibility for firms' compliance with regulatory obligations including risk management.
- MiFID L2D Article 9: Senior management must receive on a frequent basis, and at least annually, written reports on risk management issues, including any appropriate action taken in the event of deficiencies;
- MiFID L2D Article 7: Investment firms must identify the risks relating to the firms' activities, processes and systems, and set the level of risk tolerated by the firm in appropriate instances; must adopt effective arrangements, processes, and mechanisms to manage the risks relating to the firm's activities, processes and systems, in light of the established level of risk tolerance; must monitor the adequacy and effectiveness of its risk management policies and procedures, the level of compliance with arrangements,

processes and mechanisms for risk management; and must monitor the adequacy and effectiveness of measures taken to address any deficiencies. The risk management strategy should address credit and counterparty risk; residual risk; market risk; interest rate risk; operational risk; liquidity risk; securitization risk; concentration risk; and risk of excessive leverage.

- Directive 2002/87/EC Article 9: In the case of financial conglomerates, risk management processes must include approval and periodical review of the strategies and policies by governing bodies with respect to all the risks assumed; adequate capital adequacy policies to anticipate impacts on risk profiles and capital requirements; risk monitoring and controls at the level of the conglomerates.

- ESMA Guidelines on compliance function requirements (ESMA/2012/388) specify that the assessment of compliance risk should involve the compliance function, including in the case of new business lines or new financial products. Identified risks should be reviewed on a regular basis as well as ad-hoc when necessary to ensure that any emerging risks are taken into consideration. A monitoring program covering all areas of the investment firm's activities should ensure that compliance risk is comprehensively monitored. Specific measures ensure the effectiveness, the permanence and the independence of the compliance function.

- MiFID L2D Articles 21 to 23: Requirements on conflicts of interests include the obligation to adopt measures to ensure the appropriate level of independence to any person working in the firm. This includes measures preventing or controlling the exchange of information, separating the supervision of relevant persons, preventing or limiting the possibility for a person to exercise inappropriate influence over others.

Furthermore, firms must ensure that performance of multiple functions does not prevent persons from acting soundly, honestly, and professionally.

- MiFID Article 50: Supervisors can access documents for the discharge of their supervisory duties.
- CRD Annex V: Credit institutions and investment firms must have in place risk management procedures that cover credit, operational, counterparty, market, concentration, securitization, liquidity and interest rate risk.
- CRD Article 22: Credit institution's conformity with regulation is the responsibility of the institution's management body and is subject to ongoing supervisory review.⁴⁵

Specifically, the applicants state that any SD or MSP subject to MiFID and CRD that is a clearing member of a CCP, including an eligible DCO, would be required under the foregoing EU law and regulations to:

- Establish risk-based limits based on position size, order size, margin requirements, or similar factors;
- Screen orders for compliance with the risk-based limits;
- Monitor for adherence to the risk-based limits intra-day and overnight;
- Conduct stress tests under extreme but plausible conditions of all positions at least once per week;

⁴⁵ The current version of CRD will soon be replaced by CRD IV. CRD IV entered into force on June 28, 2013, and shall apply in most of its parts from January 1, 2014. The new reference is Article 74 and there will be additional detailed technical rules specifying the arrangements, processes and mechanisms that must be adopted to fulfill this requirement. Article 88 of Directive 2013/36/EU specifies that "the management body defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of an institution." Article 76 specifies tasks assigned to the management body as regards risk management.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:EN:PDF>.

- Evaluate its ability to meet initial margin requirements at least once per week;
- Evaluate its ability to meet variation margin requirements in cash at least once per week;
- Evaluate its ability to liquidate positions it clears in an orderly manner, and estimate the cost of liquidation; and
- Test all lines of credit at least once per year.

Commission Determination: The Commission finds that the MiFID, ESMA, and CRD standards specified above are generally identical in intent to § 23.609 because such standards seek to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds.

The Commission notes that the MiFID, ESMA, and CRD standards specified above are not as specific as § 23.609 with respect to ensuring that SDs and MSPs that are clearing members of a DCO establish detailed procedures and limits for clearing member risk management purposes. Nevertheless, the Commission finds that the general requirements under the MiFID, ESMA, and CRD standards specified above, implemented in the context of clearing member risk management and pursuant to the statements of the applicants, meet the Commission's regulatory objective specified above.

Based on the foregoing and the statements of the applicants above, the Commission hereby determines that the clearing member risk management requirements of the MiFID, ESMA, and CRD standards specified above are comparable to and as comprehensive as § 23.609.

C. Swap Data Recordkeeping (§§ 23.201 and 23.203)

Commission Requirement: Sections 4s(f)(1)(B) and 4s(g)(1) of the CEA, and Commission regulation 23.201 generally require SDs and MSPs to retain records of each transaction, each position held, general business records (including records related to complaints and sales and marketing materials), records related to governance, financial records, records of data reported to SDRs, and records of real-time reporting data along with a record of the date and time the SD or MSP made such reports. Transaction records must be kept in a form and manner identifiable and searchable by transaction and counterparty.

Commission regulation 23.203, requires SDs and MSPs to maintain records of a swap transaction until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of five years after such date. Records must be “readily accessible” for the first two years of the five year retention period (consistent with § 1.31).

The Commission notes that the comparability determination below with respect to §§ 23.201 and 23.203 encompasses both swap data recordkeeping generally and swap data recordkeeping relating to complaints and marketing and sales materials in accordance with § 23.201(b)(3) and (4).⁴⁶

Regulatory Objective: Through the Commission’s regulations requiring SDs and MSPs to keep comprehensive records of their swap transactions and related data, the

⁴⁶ See the Guidance for a discussion of the availability of substituted compliance with respect to swap data recordkeeping, 78 FR at 45332-33.

Commission seeks to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

The Commission's regulations require SDs and MSPs to keep swap data in a level of detail sufficient to enable regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

By requiring comprehensive records of swap data, the Commission seeks to ensure that SDs and MSPs employ effective risk management, and strictly comply with Commission regulations. Further, such records facilitate effective regulatory oversight.

The Commission observes that it would be impossible to meet the regulatory objective of §§ 23.201 and 23.203 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.203 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

Comparable EU Law and Regulations: The applicant has represented to the Commission that the following provisions of law and regulations applicable in the EU are in full force and effect in the EU, and comparable to and as comprehensive as sections 4s(f)(1)(B) and 4s(g)(1) of the CEA and §§ 23.201 and 23.203.

- MiFID Article 13(6): Firms are required to maintain records of all services and transactions undertaken by the firm that are sufficient to enable regulatory authorities to monitor compliance with MiFID and to ascertain whether the firm has complied with all obligations with respect to clients or potential clients.

- MiFID L2R Article 7: Firms are required to keep detailed records in relation to every client order and decision to deal, and every client order executed or transmitted.
- MiFID L2D Article 51: All required records must be retained in a medium available for future reference by the regulator, and in a form/manner that:
 - Allows the regulator to access them readily and reconstitute each key stage of processing each transaction;
 - Allows corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained; and
 - Ensures that records are not manipulated or altered.
- MiFID Article 25(2): Firms must keep at the disposal of the regulator, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on their own account or on behalf of a client.
- CESR (now ESMA) developed recommendations on the list of minimum records to be kept by firms in accordance with MiFID L2D and the point in time at which the record should be created. It includes marketing communications, client information, internal procedures, complaints records, complaints handling, etc.

Commission Determination: The Commission finds that the MiFID and ESMA standards specified above are generally identical in intent to §§ 23.201 and 23.203 because such standards seek to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

In addition, the Commission finds that the MiFID and ESMA standards specified above require SDs and MSPs to keep swap data in a level of detail sufficient to enable

regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

Finally, the Commission finds that the MiFID and ESMA standards specified above, by requiring comprehensive records of swap data, seek to ensure that SDs and MSPs employ effective risk management, seek to ensure that SDs and MSPs strictly comply with applicable regulatory requirements (including the CEA and Commission regulations), and that such records facilitate effective regulatory oversight.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the requirements of MiFID and ESMA with respect to swap data recordkeeping, as specified above, are comparable to, and as comprehensive as, §§ 23.201 and 23.203, with the exception of § 23.203(b)(2) concerning the requirement that an SD or MSPs make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator. The applicant has not submitted any provision of law or regulations applicable in the EU upon which the Commission could make a finding that SDs and MSPs would be required to make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator.

Notwithstanding that the Commission has not determined that the requirements of MiFID and ESMA are comparable to and as comprehensive as § 23.203(b)(2), any SD or MSP to which both § 23.203 and the MiFID and ESMA standards specified above are applicable would generally be deemed to be in compliance with § 23.203(b)(2) if that SD or MSP complies with the MiFID and ESMA standards specified above, subject to

compliance with the requirement that it make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator in accordance with § 23.203(b)(2).

Issued in Washington, DC on December 20, 2013, by the Commission.

Christopher J. Kirkpatrick,
Deputy Secretary of the Commission.

Appendices to Comparability Determination for the European Union: Certain Entity-Level Requirements

Appendix 1 – Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative. Commissioner O’Malia voted in the negative.

Appendix 2 – Joint Statement of Chairman Gary Gensler and Commissioners Bart Chilton and Mark Wetjen

We support the Commission’s approval of broad comparability determinations that will be used for substituted compliance purposes. For each of the six jurisdictions that has registered swap dealers, we carefully reviewed each regulatory provision of the foreign jurisdictions submitted to us and compared the provision’s intended outcome to the Commission’s own regulatory objectives. The resulting comparability determinations for entity-level requirements permit non-U.S. swap dealers to comply with regulations in

their home jurisdiction as a substitute for compliance with the relevant Commission regulations.

These determinations reflect the Commission's commitment to coordinating our efforts to bring transparency to the swaps market and reduce its risks to the public. The comparability findings for the entity-level requirements are a testament to the comparability of these regulatory systems as we work together in building a strong international regulatory framework.

In addition, we are pleased that the Commission was able to find comparability with respect to swap-specific transaction-level requirements in the European Union and Japan.

The Commission attained this benchmark by working cooperatively with authorities in Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland to reach mutual agreement. The Commission looks forward to continuing to collaborate with both foreign authorities and market participants to build on this progress in the months and years ahead.

Appendix 3 – Statement of Dissent by Commissioner Scott D. O'Malia

I respectfully dissent from the Commodity Futures Trading Commission's ("Commission") approval of the Notices of Comparability Determinations for Certain Requirements under the laws of Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland (collectively, "Notices"). While I support the narrow comparability determinations that the Commission has made, moving forward, the Commission must collaborate with foreign regulators to harmonize our respective regimes consistent with the G-20 reforms.

However, I cannot support the Notices because they: (1) are based on the legally unsound cross-border guidance (“Guidance”);¹ (2) are the result of a flawed substituted compliance process; and (3) fail to provide a clear path moving forward. If the Commission’s objective for substituted compliance is to develop a narrow rule-by-rule approach that leaves unanswered major regulatory gaps between our regulatory framework and foreign jurisdictions, then I believe that the Commission has successfully achieved its goal today.

Determinations Based on Legally Unsound Guidance

As I previously stated in my dissent, the Guidance fails to articulate a valid statutory foundation for its overbroad scope and inconsistently applies the statute to different activities.² Section 2(i) of the Commodity Exchange Act (“CEA”) states that the Commission does not have jurisdiction over foreign activities unless “those activities have a direct and significant connection with activities in, or effect on, commerce of the United States ...”³ However, the Commission never properly articulated how and when this limiting standard on the Commission’s extraterritorial reach is met, which would trigger the application of Title VII of the Dodd-Frank Act⁴ and any Commission regulations promulgated thereunder to swap activities that are outside of the United States. Given this statutorily unsound interpretation of the Commission’s extraterritorial

¹ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (Jul. 26, 2013).

² <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b>.

³ CEA section 2(i); 7 U.S.C. 2(i).

⁴ Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

authority, the Commission often applies CEA section 2(i) inconsistently and arbitrarily to foreign activities.

Accordingly, because the Commission is relying on the legally deficient Guidance to make its substituted compliance determinations, and for the reasons discussed below, I cannot support the Notices. The Commission should have collaborated with foreign regulators to agree on and implement a workable regime of substituted compliance, and then should have made determinations pursuant to that regime.

Flawed Substituted Compliance Process

Substituted compliance should not be a case of picking a set of foreign rules identical to our rules, determining them to be “comparable,” but then making no determination regarding rules that require extensive gap analysis to assess to what extent each jurisdiction is, or is not, comparable based on overall outcomes of the regulatory regimes. While I support the narrow comparability determinations that the Commission has made, I am concerned that in a rush to provide some relief, the Commission has made substituted compliance determinations that only afford narrow relief and fail to address major regulatory gaps between our domestic regulatory framework and foreign jurisdictions. I will address a few examples below.

First, earlier this year, the OTC Derivatives Regulators Group (“ODRG”) agreed to a number of substantive understandings to improve the cross-border implementation of over-the-counter derivatives reforms.⁵ The ODRG specifically agreed that a flexible,

⁵ <http://www.cftc.gov/PressRoom/PressReleases/pr6678-13>.

outcomes-based approach, based on a broad category-by-category basis, should form the basis of comparability determinations.⁶

However, instead of following this approach, the Commission has made its comparability determinations on a rule-by-rule basis. For example, in Japan's Comparability Determination for Transaction-Level Requirements, the Commission has made a positive comparability determination for some of the detailed requirements under the swap trading relationship documentation provisions, but not for other requirements.⁷ This detailed approach clearly contravenes the ODRG's understanding.

Second, in several areas, the Commission has declined to consider a request for a comparability determination, and has also failed to provide an analysis regarding the extent to which the other jurisdiction is, or is not, comparable. For example, the Commission has declined to address or provide any clarity regarding the European Union's regulatory data reporting determination, even though the European Union's reporting regime is set to begin on February 12, 2014. Although the Commission has provided some limited relief with respect to regulatory data reporting, the lack of clarity creates unnecessary uncertainty, especially when the European Union's reporting regime is set to begin in less than two months.

Similarly, Japan receives no consideration for its mandatory clearing requirement, even though the Commission considers Japan's legal framework to be comparable to the U.S. framework. While the Commission has declined to provide even a partial

⁶<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf>. The ODRG agreed to six understandings. Understanding number 2 states that "[a] flexible, outcomes-based approach should form the basis of final assessments regarding equivalence or substituted compliance."

⁷ The Commission made a positive comparability determination for Commission regulations 23.504(a)(2), (b)(1), (b)(2), (b)(3), (b)(4), (c), and (d), but not for Commission regulations 23.504(b)(5) and (b)(6).

comparability determination, at least in this instance the Commission has provided a reason: the differences in the scope of entities and products subject to the clearing requirement.⁸ Such treatment creates uncertainty and is contrary to increased global harmonization efforts.

Third, in the Commission's rush to meet the artificial deadline of December 21, 2013, as established in the Exemptive Order Regarding Compliance with Certain Swap Regulations ("Exemptive Order"),⁹ the Commission failed to complete an important piece of the cross-border regime, namely, supervisory memoranda of understanding ("MOUs") between the Commission and fellow regulators.

I have previously stated that these MOUs, if done right, can be a key part of the global harmonization effort because they provide mutually agreed-upon solutions for differences in regulatory regimes.¹⁰ Accordingly, I stated that the Commission should be able to review MOUs alongside the respective comparability determinations and vote on them at the same time. Without these MOUs, our fellow regulators are left wondering whether and how any differences, such as direct access to books and records, will be resolved.

Finally, as I have consistently maintained, the substituted compliance process should allow other regulatory bodies to engage with the full Commission.¹¹ While I am pleased that the Notices are being voted on by the Commission, the full Commission only gained access to the comment letters from foreign regulators on the Commission's

⁸ Yen-denominated interest rate swaps are subject to the mandatory clearing requirement in both the U.S. and Japan.

⁹ Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

¹⁰ <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-29>.

¹¹ <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b>.

comparability determination draft proposals a few days ago. This is hardly a transparent process.

Unclear Path Forward

Looking forward to next steps, the Commission must provide answers to several outstanding questions regarding these comparability determinations. In doing so, the Commission must collaborate with foreign regulators to increase global harmonization.

First, there is uncertainty surrounding the timing and outcome of the MOUs. Critical questions regarding information sharing, cooperation, supervision, and enforcement will remain unanswered until the Commission and our fellow regulators execute these MOUs.

Second, the Commission has issued time-limited no-action relief for the swap data repository reporting requirements. These comparability determinations will be done as separate notices. However, the timing and process for these determinations remain uncertain.

Third, the Commission has failed to provide clarity on the process for addressing the comparability determinations that it declined to undertake at this time. The Notices only state that the Commission may address these requests in a separate notice at a later date given further developments in the law and regulations of other jurisdictions. To promote certainty in the financial markets, the Commission must provide a clear path forward for market participants and foreign regulators.

The following steps would be a better approach: (1) the Commission should extend the Exemptive Order to allow foreign regulators to further implement their regulatory regimes and coordinate with them to implement a harmonized substituted

compliance process; (2) the Commission should implement a flexible, outcomes-based approach to the substituted compliance process and apply it similarly to all jurisdictions; and (3) the Commission should work closely with our fellow regulators to expeditiously implement MOUs that resolve regulatory differences and address regulatory oversight issues.

Conclusion

While I support the narrow comparability determinations that the Commission has made, it was my hope that the Commission would work with foreign regulators to implement a substituted compliance process that would increase the global harmonization effort. I am disappointed that the Commission has failed to implement such a process.

I do believe that in the longer term, the swaps regulations of the major jurisdictions will converge. At this time, however, the Commission's comparability determinations have done little to alleviate the burden of regulatory uncertainty and duplicative compliance with both U.S. and foreign regulations.

The G-20 process delineated and put in place the swaps market reforms in G-20 member nations. It is then no surprise that the Commission must learn to coordinate with foreign regulators to minimize confusion and disruption in bringing much needed clarity to the swaps market. For all these shortcomings, I respectfully dissent from the Commission's approval of the Notices.